Supreme Court, U.S.
FILED

NO. 98 61 JUL 3 - 1998

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1998

DAVID P. BROOME
Petitioner

versus

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPELS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

James A. McPherson
9128 Quince Street
New Orleans, LA 70118
Telephone (504) 486-2022

Attorney for Petitioner,
David P. Broome

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

28 pp

QUESTIONS PRESENTED

1. Should this Court grant certiorari to review the Eleventh Circuit's affirmation, without written reasons, of a jury verdict convicting petitioner of a Federal Fair Housing violation when he attempted to discourage an African-American family from purchasing the house next door by parading, on his own property, with a confederate flag in the presence of the perspective purchasers and using vile language?

The petitioner's actions were filmed on an FBI sting operation and clearly show the petitioner's attempt to discourage the prospective purchasers but do not disclose any attempt to threaten, other than by displaying the Confederate flag and vague statements such as - I like to make trouble.

2. Did the trial courts granting of the government's Motion in Limine, which prevented Broome from ". . .arguing that his actions are protected by the First Amendment", deny Broome a fair trial?

Without Broom being able to argue any free speech concepts he was denied a fair trial and free speech was relegated to a second class status in that courtroom and the jury got the message.

3. Was the trial court's denial of a requested jury charge, "The First Amendment to the Constitution, which guarantees freedom of speech, protects many statements that are morally repulsive, offensive or racist," reversible error?

The trial Court's charge omitted any reference to the fact that a "racist" comment might be protected speech.

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of the Petition is as follows:

United States of America
c/o Charles R. Wilson
United States Attorney
Middle District of Florida

Linda Julin McNamara
Tamra Phipps
Monte C. Richardson
Assistant United States Attorneys

Lou de Baca
Trial Attorney, U.S. Department of Justice

Deval L. Patrick
Assistant Attorney General

Leslie A. Simon
Attorney, U.S. Department of Justice

David P. Broome
c/o James A. McPherson (LA 9381)
McPherson & Schillesci
9128 Quince Street
New Orleans, Louisiana 70118

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i

LIST OF PARTIES.....ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....v

PRAYER.....1

OPINIONS BELOW.....1

JURISDICTION.....1

CONSTITUTIONAL PROVISIONS INVOLVED.....1

STATEMENT OF THE CASE.....2

(a) Procedural Statement of the Case.....2
(b) Course of Relevant Proceedings in the Trial Court.....2
(c) Statement of Facts Necessary to the Argument of Issues.....3

REASONS FOR GRANTING WRIT.....4

CONCLUSION.....8

TABLE OF CONTENTS (continued)

Page

APPENDIX:

App. A Indictment.....A-1

App. B Judgment in a Criminal Case.....A-4

App. C Judgment.....A-9

App. D Appeal from the United States District Court for the Middle District of Florida.....A-11

App. E On Petition for Rehearing and Suggestion of Rehearing En Banc Per Curiam.....A-13

TABLE OF AUTHORITIES

CASES: **PAGE**

Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995).....5

N.A.A.C.P. v. Hunt, 891 F.2d 1555, 1565 (11th Cir. 1990).....5

Texas v. Johnson, 491 U.S. 397, 408, 409, 109 S.Ct. 2533, 2542, 105 L.Ed.2d 342 (1989).....6

CONSTITUTIONAL PROVISIONS:

First Amendment to the United States Constitution.....1

STATUTES AND RULES:

28 U.S.C. §1291.....1

42 U.S.C. §3631.....2

PRAYER

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered December 30, 1997 and the denial of a Petition for Rehearing and Suggestion for Rehearing *en banc* filed on April 6, 1998.

OPINIONS BELOW

The Court of Appeals without written analysis affirmed the decision of the District Court and denied the Petition for Rehearing and Suggestion for Rehearing *en Banc.*

JURISDICTION

This is an appeal from a jury verdict convicting Mr. Broome of three misdemeanor counts and the Court's entry of judgment and sentence of twenty-one months imprisonment. The United States Court of Appeals for the Eleventh Circuit affirmed the conviction and sentence on December 30, 1997. A timely Petition for Rehearing and Suggestion for Rehearing *en banc* was denied on April 6, 1998.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Amendment I of the United States Constitution

Congress shall make no law respecting an

establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

(a) Procedural Statement of the Case.

The petitioner was indicted on February 1, 1996. Trial by jury commenced on August 26, 1997 and a verdict on all three counts was returned on August 29, 1997. The United States Court of Appeals for the Eleventh Circuit affirmed the conviction and sentence on December 30, 1997. Petition for Rehearing and Suggestion for Rehearing *en banc* was denied on April 6, 1998.

(b) Course of Relevant Proceedings in the Trial Court.

The Petitioner was charged with three misdemeanor counts in violation of the Federal Fair Housing Act, 42 U.S.C. §3631, as follows:

Count 1 charged that Broome, by force and threat of force interfered with a black family's purchase of a house at 8550 Sunnydale Lane, Lakeland, Florida.

Count 2 charged that Broome, by force and threat of force interfered with Robert B. Lee's sale of an alarm system to the would be purchasers named in Count 1.

Count 3 charged that Broome, by force and threat of force interfered with two F.B.I. agents, posing as a black

couple interested in buying the same house. (The Count 3 incident was video taped by the FBI and is available as Exhibit "1".)

Broome moved to dismiss the indictment on the ground that it abridges the freedom of speech guaranteed in the First Amendment to the Constitution of the United States of America in its application herin. The motion was denied on August 6, 1996.

The Government filed a Motion to Limine requesting ". . .that this court limit the scope of the Defendant's argument to prevent him from arguing that his actions are protected by the First Amendment. . . ." The trial court granted the government's motion.

Broome requested a jury charge that, "The First Amendment to the Constitution, which guarantees freedom of speech, protects many statements that are morally repulsive, offensive or racist." The court denied the requested charge but did give a similar charge omitting "racists".

Broome was sentenced to a total of 21 months on these three misdemeanor counts.

(c) Statement of Facts Necessary to the Argument of Issues.

A real estate sub-contractor reported to the FBI that a client of his, an African-American lady, and her family had been discouraged, for racial reasons, from buying a home by the adjacent home owner, a white male. On January 26, 1995 two black F.B.I. agents, Debra Evans Smith and Daron

Council were assigned as undercover agents to pose as a couple interested in buying the house "to see if the same thing would happen to us. . . .". The entire episode was video taped and voice recorded, shown to the jury and introduced into evidence. It shows Broome walking up and down on his property carrying a Confederate flag and Broome makes it abundantly clear that he did not want black people living next door to him. This video tape contains the entirety of the words and actions that comprise Count three. It is a two thumbs up, must see production.

Count one involves the actual event with the Watkins family and count two concerns an alarm salesman who happens upon the scene and fails to make a sale due to Broome's interference. These counts are supported by contradictory testimony, but because of the "viewed in the light most favorable to the government" standard these counts will not be argued herein on the basis of sufficiency of the evidence. However, there is no dispute as to what happened in count three, it is all on the video tape.

Broome received a jail sentence of twelve months on Count one, six months on Count two and three months on Count three, all to run consecutively for a total of twenty-one months and restitution of $9,500.

REASONS FOR GRANTING WRIT

1. Denial of Free Speech Rights.

The Federal Fair Housing Act prohibits the use of force or threat of force. "Thus, the prohibition of 'force' in this statute does not involve pure speech; rather, it involves only

physical force." *Cheffer v. Reno,* 55 F.3d 1517 (11th Cir.,1995).

The video tape of the Count 3 incident reveals that there was no use of force and the threat of force came from Broome's (1) parading with the Confederate flag, (2) vile language and (3) racist comments. Agent Council admitted that Broome ". . .did not threaten me physically." Broome did state on the video tape that he would cause trouble and that he liked causing trouble. Broome explained, in his testimony, what he meant by causing trouble;

> Q. All right, sir. What did you mean when you said that you liked causing trouble?
>
> A. I didn't mean physical trouble, I meant that if he moved in, if he didn't keep his yard up, if he pulled some old junk cars out there, if he didn't do what's prescribed to live in the neighborhood, that I would cause trouble for him.
>
> Q. You would call who?
>
> A. If he didn't do what was supposed to be done in that subdivision, keeping your place up, that I would cause trouble. I would call the county on him. That's exactly what I meant.

The effect of the Confederate flag upon the African-American viewers may be hurtful to some, it is a matter of individual sensitivity. "The federal judiciary is not empowered to make decisions based on social sensitivity." *N.A.A.C.P. V. Hunt,* 891 F.2d 1555, 1565 (11th Cir. 1990). Neither should a federal jury. The Federal Fair Housing Act

has a noble purpose; even so, it cannot infringe upon a more noble concept, freedom of speech.

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable." *Texas v. Johnson,* 491 U.S. 397, 408, 409, 109 S.Ct. 2533, 2542, 105 L.Ed.2d 342 (1989).

"Racism" has become the scarlet letter of our times. Our courts should not succumb to the sensitivity concerns of the politically correct when First Amendment - free speech - issues are at stake.

2. In Limine Ruling Unduly Restrictive

The Government filed a Motion in Limine requesting ". . .that this court limit the scope of the Defendant's argument to prevent him from arguing that his actions are protected by the First Amendment. . . ." This issue was resolved by the Court on the first day of trial when the prosecutor stated:

> MR. DE BACA: The other issue is that we would like the court to inquire as to what, if any, reference defense is going to make in their opening statement as far as the First Amendment issue -
>
> THE COURT: Well, I think we've settled that. I have an understanding that I — inasmuch as I haven't been told about any, there will be none. So I don't plan on inquiring into it further. And anyone who would go outside that does so at their own risk.

Broome's counsel did not risk it.

3. Failure to Give Requested Jury Charge

Broome requested the trial judge to charge the jury that, "The First Amendment to the Constitution, which guarantees freedom of speech, protects many statements that are morally repulsive, offensive or racist." The court denied the requested charge stating, "No. Your specific request is made and I have overruled that request for the purpose of the record." The court charged, "The First Amendment to the Constitution, which guarantees freedom of speech, protects many statements that are morally repulsive or otherwise offensive." The word "racist" was omitted along with the concept.

At the charging conference this matter was discussed. Broome's attorney stated, ". . .reprehensible and racist comments are protected free speech. So I think we ought to put racist comments. . . ." The court responded:

> THE COURT: Well, I'm not — to the extent that's the case, I'm not going to make that announcement in this court.
> * * * *
> THE COURT: I'm not going to make that announcement.
> * * * *
> THE COURT: It will get you some time in the poky right around here, right downstais, floor one.
> * * * *
> THE COURT: I obviously was not directing that at — a point at you, Mr. McPherson, but to the — my point of disagreement with his that it will not be made my business to lend credence associated

> with this office and this building and this room to that notion. Even though it be accurate technically under certain circumstances, it does not bear this in my perimeter.

These admonitions had a particularly chilling effect upon Broome's counsel's ability to argue any aspect of free speech. Particularly so, because the court was to give its jury instructions prior to the closing arguments. The court would therefore have to interrupt counsel's argument if counsel strayed into the forbidden areas. Counsel had no choice but to abide by the court's ruling. It worked to the detriment of Broome's fair trial rights.

Broome was convicted of his racist statements but due to the charges to the jury and the court's rulings he was judicially restrained from arguing his First Amendment - free speech defense.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

James A. McPherson (LA. Bar #09381)
9128 Quince St.
New Orleans, Louisiana 70118
Telephone: (504) 486-2022
Fax: (504) 486-6050
Attorney for David P. Broome

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Filed Feb 2-96

UNITED STATES OF AMERICA	:	
	:	
v.	:	CASE NO. 96-18-Cr-T-23C
	:	
DAVID P. BROOME	:	

INDICTMENT

COUNT ONE

A. INTRODUCTION

At all times material to the changes herein:

From on or about August 19, 1994, through on or about September 17, 1994, in and around Lakeland, Florida, within the Middle District of Florida, the defendant,

DAVID P. BOONE,

by force and threat of force, did willfully intimidate and interfere with, and attempt to intimidate and interfere with, Clarissa Chandler Watkins, Alonzo Watkins, and their two children, a black family, because of their race and color and because they were and had been purchasing, occupying, and contracting for the purchase and occupation of a dwelling,

to wit: a house then under construction at 8550 Sunnydale Lane, Lakeland, Florida.

In violation of Title 42, United States Code, Section 3631(a).

COUNT TWO

On or about August 19, 1994, in and around Lakeland, Florida, within the Middle District of Florida, the defendant,

DAVID P. BROOME,

by force and threat of force, did willfully intimidate and interfere with, and attempt to intimidate and interfere with, Robert B. Lee, a white male, because he was and had been, and in order to discourage him from aiding and encouraging other persons in the purchase, occupation, and contracting for the purchase and occupation of a dwelling, without discrimination on account of race or color, to wit: a house then under construction at 8550 Sunnydale Lane, Lakeland, Florida.

In violation of Title 42, United States Code, Section 3631(c).

COUNT THREE

On or about January 26, 1995, in and around Lakeland, Florida, within the Middle District of Florida, the defendant,

DAVID P. BOONE,

by force and threat of force, did willfully intimidate and

interfere with, and attempt to intimidate and interfere with, Darren Council and Debra Evans, because of their race and because they were contracting and negotiating for the purchase of a dwelling, to wit: being shown the house located at 8550 Sunnydale Lane, Lakeland, Florida.

In violation of Title 42, United States Code, Section 3631(a).

A TRUE BILL

_____

FOREPERSON

CHARLES R. WILSON
United States Attorney

By: /s/ Monte C. Richardson
MONTE C. RICHARDSON
Assistant United States Attorney

By: /s/ Terry A. Zitek
TERRY A. ZITEK
Assistant United States Attorney
Chief, Criminal Division

/s/ Lou De Baca
LOU DE BACA
PETE MCCLOSKEY
Attorneys
Civil Rights Division
U. S. Department of Justice

APPENDIX B

AO 2455 (Rev. 4/90) Sheet 1 - Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Filed Feb 13-97

UNITED STATES OF AMERICA	JUDGMENT IN A CRIMINAL CASE (For Offenses Committed on or After November 1, 1987)
VS.	CASE NUMBER: 96-18-CR-T-23C
DAVID BROOME	Defendant's Attorney: JAMES A. McPHERSON

THE DEFENDANT:

X was found guilty on counts one, two, and three after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

TITLE & SECTION	NATURE OF OFFENSE	DATE OFFENSE CONCLUDED	COUNT NUMBER(S)
42 U.S.C. §3631(a)	Using force or threat of force to intimidate & interfere with the procurment of housing benefits.	January 19, 1995	One & Three
42 U.S.C. § 3631(c)	Using force or threat of force to intimidate & interfere with a person aiding & encouraging others to procure housing benefits.	August 19, 1994	Two

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

X It is ordered that the defendant shall pay a special assesment of $150.00, for counts one, two & three, which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:	249-80-0940
Defendant's Date of Birth:	June 27, 1947
Defendant's Mailing Address:	8602 Sunny Dale Lane Lakeland, FL 33809
Defendant's Residence Address:	Same

Date of Imposition of Sentence: January 31, 1997

/s/ Steven D. Merryday

STEPHEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

Date: February 13th, 1997

M'FILM ROLL 3
DOCUMENT 1919

AO 2455 (Rev. 4/90) Sheet 2 - Imprisonment

Defendant: David Broome Judgment - Page 2 of 5
Case No.: 96-18-CR-T-23C

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisonment for a term of TWELVE MONTHS for Count One, SIX MONTHS for Count Two, and THREE MONTHS for Count Three, to run consecutively.

____ The court makes the following recommendations to the Bureau of Prisons:

____ The defendant is remanded to the custody of the United States Marshal.

X The defendant shall surrender to the United States Marshal for this district.

__at__on_____.
X as notified by the United States Marshal on a reporting date substantially within 30 days.

__ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

__before 2 p.m. on _____.
__as notified by the United States Marshal.
__as notified by the probation office.
__as notified by the United States Marshal, but not before _____.

A-8

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on ____ to _____at _____, with a certified copy of this judgment.

_____

United States Marshal

By: _____

Deputy Marshal

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No.97-2268
Non-Argument Calendar

Filed Dec 30-97

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID P. BROOME

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

Before TJOFLAT, ANDERSON and CARNES, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the **Judgment of conviction and the sentence imposed** by the said District Court in this cause be and the same are hereby **AFFIRMED.**

Entered: December 30, 1997
For the Court: Thomas K. Kahn,
Clerk

By: /s/ Matt Dawson
Deputy Clerk

ISSUED AS MANDATE: 4/16/98

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No.97-2268
Non-Argument Calendar

Filed Dec 30-97

D. C. Docket No. 96-18-CR-T-23C

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID P. BROOME

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(December 30, 1997)

Before TJOFLAT, ANDERSON and CARNES, Circuit Judges.

PER CURIAM:

David P. Broome appeals his conviction and his sentence for three counts of criminal interferences with housing rights in violation of 42 U.S.C. § 3631. He challenges his convictions on the grounds that (1) the district court abused its discretion in refusing to give a requested charge that

racial remarks could be constitutionally protected speech; (2) he was denied a fair trial because the district court's *in limine* ruling precluded him from arguing that his actions were protected by the First Amendment; and (3) the evidence was insufficient to convict. We find no merit in any of these grounds and accordingly affirm Broome's convictions.

Broome challenges the district court's sentencing decisions on the ground that the court misapplied the guidelines by (1) granting an upward departure due to the victim's vulnerability; (2) failing to group the counts that arose from a single harm; i.e., the discouragement of blacks from buying the house next door; (3) failing to recognize mitigating circumstances that justified a downward departure; and (4) ordering restitution when the court's probation office did not recommend restitution. We find no merit in any of these challenges and thus affirm Broome's sentences.

AFFIRMED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No.97-2268

Filed Apr 06 1998

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID P. BROOME

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19___, _____F.2d_____).

Before: TJOFLAT, ANDERSON and EDMONDSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on

rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ illegible

UNITED STATES CIRCUIT JUDGE